

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
TROY X. KELLEY,  
  
Defendant.

NO. CR15-5198 RBL

**GOVERNMENT'S OPPOSITION TO  
EX PARTE MOTION FOR RELEASE  
OF FUNDS**

Defendant, Troy Kelley, has filed a motion seeking the release of \$200,000, to be used for payment of experts, from the \$908,397.51 that the Court recently ordered returned to Calfo Harrigan Leyh & Eakes LLP's trust account. That \$908,397.51 originally was seized from the trust account of Davis Wright Tremaine LLP, pursuant to a seizure warrant based upon a probable-cause finding by United States Magistrate Judge Brian Tsuchida that the money was subject to forfeiture as property involved in a money laundering transaction, or property traceable to such property.

Kelley sought, and received, a due process hearing from this Court concerning the seizure. At that hearing, which took place on December 1-3, 2015, the Government presented testimony and exhibits to support Magistrate Judge Tsuchida's probable-cause determination. At the conclusion of the hearing, the Court indicated that it did not wish

1 “possibly, to taint the jury to taint the jury panel with [its] observation of guilt or  
2 innocence on anything,” and that it wished to “go back to the *status quo ante*.”  
3 Transcript of Hearing at 48, 51 (Dec. 3). As a result, the Court ordered the money  
4 “transferred to Mr. Calfo’s trust account, to be held in a blocked account unless and until  
5 further proceedings occur[.]” *Id.* at 58.

6 Kelley has now filed a motion seeking the release of \$200,000 of the frozen  
7 money to pay experts. The Court should deny this motion for several reasons. First, it  
8 appears highly likely that Kelley has sufficient alternative assets available fully to fund  
9 his defense, including paying experts, without disturbing the *status quo* and depleting the  
10 frozen funds. Kelley should be required to exhaust those other available resources, which  
11 the Government has neither sought to restrain nor to forfeit, before asking the Court to  
12 allow him to spend funds that are subject to forfeiture. Second, the restrained funds are  
13 the likeliest source of restitution for Kelley’s victims. If Kelley is permitted to spend  
14 these funds, victims will go uncompensated for their losses. And, third, it is well  
15 established that defendants may not use forfeitable money to fund their criminal defense.

16 **1. It Appears Kelley has Sufficient Alternative Assets to Fund his Defense.**

17 Although the Government is at somewhat of a disadvantage, since it has not had  
18 the benefit of seeing any portion of Kelley’s submission to the Court, the Government  
19 believes that Kelley cannot establish that he lacks sufficient alternative assets to fund his  
20 defense.

21 As an initial matter, Kelley clearly had sufficient resources to enable him to retain  
22 his attorney of choice. Kelley initially was represented by Mark Bartlett of Davis Wright  
23 Tremaine LLP and Robert McCallum of LeSourd & Patten, P.S. Kelley subsequently  
24 elected to retain Angelo Calfo to replace prior counsel, in approximately August 2015.  
25 Mr. Calfo agreed to represent Kelley at a time when the subject \$908,397.51 was being  
26 retained in the Davis Wright account by agreement of the parties. Mr. Calfo took on the  
27 representation knowing that the Government intended to seek forfeiture of those funds,  
28

1 and that there was a strong probability that they would be seized and unavailable to apply  
2 towards Kelley's defense.

3 In addition, FBI Forensic Accountant Gary Beisheim has analyzed Kelley's  
4 available resources as of April 30, 2015, a date shortly after Kelley's April 15, 2015,  
5 indictment. Mr. Beisheim's analysis is summarized in a declaration, with attached  
6 spreadsheets, that the Government is filing under seal on this same date. The analysis  
7 shows that (separate and apart from the \$908,397.51, that Kelley transferred to the trust  
8 account of Davis Wright, and that the Government subsequently seized), Kelley had paid  
9 an additional significant sum to Davis Wright just prior to April 30, 2015, presumably for  
10 legal representation. It is likely that some of this money was unspent and still available  
11 in August, 2015, and subsequently was transferred to Calfo Harrigan.

12 In addition, Mr. Beisheim's analysis shows that Kelley had a large amount of  
13 additional investment assets as of April 30, 2015. Kelley and his wife also had  
14 substantial equity in their residence. And, finally, since returning to work as State  
15 Auditor, Kelley has been drawing a significant salary for that position. While the  
16 Government cannot know what figures Kelley may have presented to the Court to  
17 support his request to use a portion of the restrained funds to pay experts, the  
18 Government believes that, when the Court takes into account the significant assets sent to  
19 defense counsel before April 30, 2015, and the even larger pool of assets and income still  
20 available to Kelley, the Court should find that Kelley has sufficient assets to pay both  
21 counsel and experts without tapping into any of the restrained funds at the present time, if  
22 not throughout the case.

23 At a minimum, the Court should find that, even if Kelley is likely to expend all of  
24 his alternative assets at some future point -- as might be inferred from Mr. Calfo's  
25 representation in e-mail correspondence that "the funds [Kelley] currently has available  
26 will be necessary to pay trial counsel through the trial and in connection with any post-  
27 trial motions or proceedings" -- Kelley should in fact be required to do so before being  
28 permitted to draw against funds that are subject to forfeiture. If Kelley indeed exhausts

1 available alternative assets, the Court can consider at that time whether Kelley should be  
2 entitled to use restrained funds for his defense, or should instead be required to seek other  
3 sources of funds (such as CJA funds) for his defense.

4 **2. The Restrained Funds Will be Needed for Restitution.**

5 To be balanced against Kelley's application for \$200,000 for expert fees is the  
6 competing need for those funds for restitution to the victims of Kelley's crimes.  
7 Assuming that Kelley is arguing, and is correct, that his alternative funds will be  
8 consumed by legal fees, the only funds available to pay Kelley's restitution obligations  
9 post-trial if he is convicted are the funds that currently are restrained by the Court's order.  
10 Assuming also that Kelley is convicted, a restitution order is entered, and the  
11 \$908,397.51 is forfeited, the Government will apply to the Asset Forfeiture and Money  
12 Laundering Section of the Criminal Division of the Department of Justice to return these  
13 funds to the victims of Kelley's crimes in partial satisfaction of Kelley's outstanding  
14 restitution obligation, pursuant to the Department's Restoration Policy. *See Asset*  
15 *Forfeiture Policy Manual*, Ch. 12, Section I.B. (2013).

16 Even the full \$908,397.51 is likely to be insufficient to pay the full amount of  
17 restitution in this case. FBI Forensic Accountant Beisheim testified at the Due Process  
18 hearing that Kelley's business, Post Closing Department, received a total of  
19 \$3,766,282.07 from Fidelity National Title and Old Republic Title. *See* Government's  
20 Exhibit 40. Forensic Accountant Beisheim further testified that Kelley unlawfully  
21 retained at least \$2,964,679.52 of this amount that should have been refunded to  
22 borrowers. *See id.*

23 Although, Kelley subsequently settled a lawsuit brought by Old Republic on  
24 behalf of its borrowers, none of the Fidelity victims has received any restitution. Of the  
25 \$3,766,282.07 that Post Closing Department took in, \$1,268,962.38 came from Old  
26 Republic. *See* Government's Exhibit 38. The remaining \$2,497,319.69 came from  
27 Fidelity. As a result, after subtracting fees earned on this amount (namely, \$317,370, *see*  
28 Government's Exhibit 40), and all of the trustee and recording fees and refunds paid by

1 Post Closing Department (namely, \$248,772.55, *see id.*), Kelley unlawfully retained at  
2 least \$1,931,177.14 that should have been refunded to Fidelity borrowers.

3 The \$908,397.51 that currently is restrained by the Court will pay less than half of  
4 this amount of restitution. If the Court were to permit Kelley to spend \$200,000 of the  
5 restrained money for experts, the shortfall would be even greater. The Court should not  
6 permit Kelley to use forfeitable funds that could be used to make his victims whole, in  
7 order to pay instead for his own criminal defense. As the Supreme Court stated in *Caplin*  
8 & *Drysdale, Chartered v. United States*, 491 U.S. 617, 629-30 (1989),

9 The Government's interest in winning undiminished  
10 forfeiture thus includes the objective of returning property, in  
11 full, to those wrongfully deprived or defrauded of it. Where  
12 the Government pursues this restitutionary end, the  
13 Government's interest in forfeiture is virtually  
14 indistinguishable from its interest in returning to a bank the  
15 proceeds of a bank robbery; and a forfeiture-defendant's  
16 claim of right to use such assets to hire an attorney, instead of  
17 having them returned to their rightful owners, is no more  
18 persuasive than a bank robber's similar claim.

### 17 **3. Kelley Has no Constitutional Right to Use Forfeitable Funds to Pay for his** 18 **Legal Defense**

19 Finally, case law that has been consistently followed for over twenty-five years,  
20 bars the use of forfeitable funds to fund a defendant's criminal defense, even if a  
21 defendant has no other assets to pay attorneys' fees or other defense costs. This issue  
22 was considered by the Supreme Court in 1989 in two cases, *Caplin & Drysdale,*  
23 *Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491  
24 U.S. 600 (1989).<sup>1</sup> In *Caplin & Drysdale*, the Court held that neither the Fifth  
25 Amendment nor the Sixth Amendment exempted from forfeiture money that a convicted

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26 <sup>1</sup> Although the Government has not summarized the evidence introduced at the December 1-3 evidentiary hearing  
27 that establishes that the \$908,397.51 is in fact forfeitable, because the Court does not need to reach this issue to deny  
28 Kelley's request, and based upon the Court's indication at the conclusion of the hearing that it did not wish to make  
a finding as to probable cause, the Government will be prepared to address the issue at the status conference  
scheduled for January 6, 2016, or to file an additional brief doing so, if the Court wishes.

1 defendant had agreed to pay to his attorney. *Caplin & Drysdale*, 491 U.S. at 623-35.  
2 The Court stated “it is our view that there is a strong governmental interest in obtaining  
3 full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment  
4 interest in permitting criminals to use assets adjudged forfeitable to pay for their  
5 defense.” *Caplin & Drysdale*, 491 U.S. at 631.

6 In the companion *Monsanto* case, the Court considered the related question of  
7 whether the Government’s freezing assets, subject to forfeiture, of an indicted defendant,  
8 which the defendant wished to use to pay his lawyer to defend him in the criminal case,  
9 violated the defendant’s Sixth Amendment right to counsel of choice or the Due Process  
10 Clause of the Fifth Amendment. *Monsanto*, 600 U.S. at 614-16. Following the same  
11 rationale it had applied in *Caplin & Drysdale*, the Court held that there was no Fifth  
12 Amendment or Sixth Amendment violation, and that even those assets needed to pay an  
13 attorney were subject to restraint, if probable cause had been established that the assets  
14 were subject to forfeiture, to preclude the defendant from dissipating his assets prior to  
15 trial. *Id.* As recently as 2014, the Supreme Court has reiterated that *Monsanto* is still the  
16 applicable law. *Kaley v. United States*, 134 S. Ct. 1090 at 1097 (2014) ) (“With probable  
17 cause, a freeze [of forfeitable assets] is valid.”).

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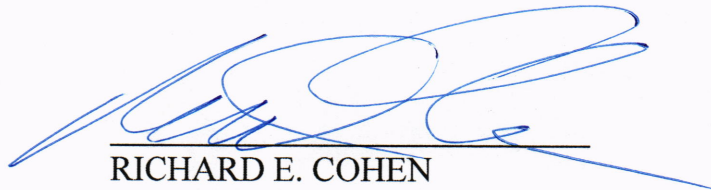
1       **4. Conclusion**

2           For the foregoing reasons -- particularly, because it appears Kelley has other assets  
3 available that could be used to pay for experts, and because permitting Kelley to use the  
4 restrained funds to pay experts will dissipate funds that are likely to be necessary to pay  
5 restitution to Kelley's victims -- the Court should deny Kelley's request to use \$200,000  
6 of the restrained funds to pay for experts.

7           DATED this 5th day of January, 2016.

8                               Respectfully submitted,

9                               ANNETTE L. HAYES  
10                              United States Attorney

11                              

12                              RICHARD E. COHEN  
13                              ANDREW FRIEDMAN  
14                              Assistant United States Attorneys  
15                              700 Stewart Street, Suite 5220  
16                              Seattle, Washington 98101  
17                              Telephone: 206-553-7970  
18                              Facsimile: 206-553-0882  
19                              E-mail: [Andrew.Friedman@usdoj.gov](mailto:Andrew.Friedman@usdoj.gov)  
20   [Richard.E.Cohen@usdoj.gov](mailto:Richard.E.Cohen@usdoj.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that on January 5, 2016, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

s/Jennifer Biretz

JENNIFER BIRETZ

FSA Supervisory Paralegal

United States Attorney's Office

700 Stewart Street, Suite 5220

Seattle, Washington 98101-1271

Telephone: (206) 553-1520

Facsimile: (206) 553-6934

Email: Jennifer.Biretz@usdoj.gov